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No. 91-453

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, David H. Lucas. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public

interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The opinion below holds that a valid exercise of the police power will insulate the government from a taking claim, even though the regulation deprives landowners of all economically viable use of property. Amicus submits that this holding conflicts with prior precedents of this Court, and of a United States Court of Appeals, wherein a taking has been found whenever a regulation fails to substantially advance legitimate governmental interests *or* deprives landowners of economically viable use of property. By failing to acknowledge this either/or takings test, the South Carolina Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court and of a United States Court of Appeals.

STATEMENT OF THE CASE

The facts of the case are simple. Petitioner is the owner of two undeveloped oceanfront lots in Charleston County, South Carolina, which he purchased in 1986 for $975,000. On July 1, 1988, the South Carolina General Assembly adopted the Beachfront Management Act

(Act),[1] which regulated development along the South Carolina coastline by imposing statutorily mandated setback lines. The Beachfront Management Act is administered by respondent, South Carolina Coastal Council.

A setback line precluded petitioner from building residences or making any other reasonable economic use of his property. Petitioner instituted an action in the South Carolina Court of Common Pleas, asserting that the restriction on the use of his two lots amounted to a taking of his private property for a public use without just compensation. The court agreed and awarded petitioner just compensation for a regulatory taking. In reaching this conclusion, the court made the following finding of fact:

> "I find that the imposition of building restrictions on Lots 22 and 24 imposed by the South Carolina Coastal Council deprives [petitioner] of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." Order of the Court of Common Pleas at 5.

The South Carolina Supreme Court reversed the judgment of the Court of Common Pleas, though it in no way questioned the factual finding that the Beachfront Management Act effectively deprived petitioner of all economically viable use of property. The reversal was grounded instead on the court's belief that a valid exercise of the police power precludes a taking. Petitioner's argument that deprivation of economically viable use, in

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[1] S.C. Code Ann. § 48-39-10, *et seq.* (Law Co-op 1990).

and of itself, will work a taking, was dismissed as an "erroneous statement of existing law." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (1991).

The question presented to this Court is whether the Fifth Amendment to the United States Constitution requires the payment of just compensation when an alleged health and safety regulation denies a property owner all economically viable use. Amicus respectfully submits that the opinion of the South Carolina Supreme Court, which answered this question in the negative, is utterly irreconcilable with this Court's prior decisions and a recent decision of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) and (c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court or of a United States Court of Appeals. Both grounds for review are present in this case.

I

THIS COURT HAS NEVER REQUIRED PROPERTY OWNERS TO INVALIDATE LAND USE REGULATIONS AS A PRECONDITION TO JUST COMPENSATION

In concluding that no taking occurred, the court below emphasized at length the fact that petitioner did not challenge the validity of the Beachfront Management

Act. This was construed as a "concession" that the Act was designed to abate the noxious use of property. *Lucas*, 404 S.E.2d at 900.

This Court has repeatedly held, however, that the Just Compensation Clause was designed " 'not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' " *Preseault v. Interstate Commerce Commission*, 494 U.S. ___, 108 L. Ed. 2d 1, 13 (1990) (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313 (1987) (emphasis in original)).

That property owners are not in every circumstance required to challenge the validity of the governmental regulation is evidenced by this Court's unambiguous takings test: a taking occurs "if the ordinance does not substantially advance legitimate state interests . . . *or* denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted; emphasis added). *See also Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981): "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of land . . . . ' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987): "We have *long recognized* that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " (Quoting *Agins*, 447 U.S. at 260 (emphasis added; brackets in original).)

This two-prong test, like the Just Compensation Clause itself, does not refer to a "balancing" of public and private interests. Indeed, just compensation is mandated when governmental regulations are enacted for the benefit of the public. As the Fifth Amendment provides, "nor shall private property be taken *for public use* without just compensation." (Emphasis added.) To require property owners in every instance to challenge the validity of the governmental regulation would twist the Constitution into the following: "nor shall private property be taken without just compensation, *unless* for a public use."

This Court's decision in *First English*, and its unambiguous either/or takings test, demonstrates the fallacy of the argument that governmental entities are insulated from the just compensation mandate simply because their land use regulations are valid exercises of the police power.

II

MUGLER DOES NOT STAND FOR THE PROPOSITION THAT THERE IS A "PUBLIC HARM" OR "NUISANCE" EXCEPTION TO THE JUST COMPENSATION CLAUSE WHEN A REGULATION RESULTS IN THE DEPRIVATION OF ALL ECONOMICALLY VIABLE USE

The court below cites five United States Supreme Court cases in support of the proposition that there is a "nuisance" exception to the Just Compensation Clause which applies even when there is a complete deprivation of economically viable use: *Mugler v. State of Kansas*, 123 U.S. 623 (1887), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915),

Miller v. Schoene, 276 U.S. 272 (1928), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987).

There are several reasons, however, why the lower court's reliance on these five cases is misplaced. First, *Mugler* could not have created an exception to the Just Compensation Clause because the United States Supreme Court had not yet recognized the possibility of a regulatory taking. Second, none of these cases involved the complete deprivation of economically viable use.

A. Mugler Was Decided Before Regulatory Takings Were Recognized

Mugler involved a challenge to a Kansas statute which prohibited the manufacture and sale of intoxicating liquors. The property owners contended that their respective breweries would, in light of the statute, be of little or no value if not employed in the manufacture of beer. In concluding that the state's restriction on the permissible uses of the plaintiffs' breweries did not constitute a taking, the *Mugler* Court pointed out that the liquor prohibition was a legitimate police power objective:

> "[I]t is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. . . . [W]e cannot shut out of view the fact, within the knowledge of all, that

> the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks." 123 U.S. at 661-62.

It is important to point out, however, that *Mugler* was decided more than 30 years before this Court recognized that a regulatory taking could occur when it decided the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[2] Because *Mugler* was issued before regulatory takings were even recognized, the Court was concerned only with the question of whether the regulation was a legitimate exercise of the state's police powers and not whether the property owner was deprived of economically viable use. That was the beginning, and the end, of the inquiry.

This point is illustrated by the *Mugler* Court's recognition that it was concerned, not with the Kansas regulation's economic impact on the property, but rather, with whether the regulation could survive substantive *due process* review:

> "These [eminent domain] principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Co.* arose under the State's power of eminent domain; while the question now before us arises under what are, *strictly*, the police powers of the State, exerted for the protection of the health, morals, and safety of the people." *Id.* at 668 (emphasis added).

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[2] As Justice Holmes emphasized in *Pennsylvania Coal*, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

Even if a state's regulation did not advance a legitimate police power, the *Mugler* Court pointed out that the Fourteenth Amendment's Due Process Clause, as opposed to the Fifth Amendment's Takings Clause, would be implicated:

> "[Police power legislation cannot] come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law." *Id.* at 669.[3]

This illustrates the inapplicability of *Mugler* to the facts of the present case, and to post-*Pennsylvania Coal* takings principles. It is, in a nutshell, impossible for *Mugler* to have created an exception to the requirement of just compensation for regulatory takings, because this Court had not yet recognized the rule that regulatory takings could occur, an issue which *Mugler* did not address.

B. This Court Has Never Insulated Governmental Entities from the Just Compensation Mandate when Property Owners Suffer a Complete Deprivation of Economically Viable Use

As noted above, the court below in no way questioned the factual finding that petitioner suffered a

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[3] Today, of course, a regulatory *taking* under the Fifth Amendment may occur if the regulation does not substantially advance legitimate state objectives *or* results in the denial of all economically viable use. *See, e.g., Agins v. City of Tiburon*, 447 U.S. at 260.

complete deprivation of economically viable use as a result of the Beachfront Management Act. The court nevertheless insulated the South Carolina Coastal Council from the Fifth Amendment's just compensation requirement. A close analysis of the quintet of cases cited by the lower court reveals a complete dearth of precedent to support the proposition that the government may extinguish all economically viable use without the constitutional obligation to pay just compensation. The reason for this is quite simple: none of these cases involved the complete diminution of all economically viable use.

In *Mugler*, the plaintiffs did not contend, nor did this Court conclude, that no structures at all could be built or that there was in any way a complete deprivation of all economically viable use of land.

In *Hadacheck*, a city ordinance made it unlawful for any person to operate an establishment or factory for the manufacture or burning of brick within described geographical limits. The *Hadacheck* Court was thus not presented with a regulation of *all* economically viable use of property, because the plaintiff was free to construct residences or other types of manufacturing enterprises on the property. Moreover, *Hadacheck*, like *Mugler*, was decided prior to this Court's determination that regulatory takings were possible in the *Pennsylvania Coal* case.

In *Miller*, the State of Virginia ordered plaintiffs to cut down a large number of ornamental red cedar trees growing on their property as a means of preventing the communication of a rust or plant disease, with which they were infected, to the apple orchards in the vicinity. Plaintiffs were, however, entitled to use the felled trees

and to make any other economically viable use of property with the sole exception being the continued growth of red cedar trees.

It should also be noted that the plaintiffs did not even allege a Fifth Amendment taking in *Miller*, only a due process challenge. *Miller* cannot, therefore, be cited as a Fifth Amendment Takings Clause precedent.

In *Goldblatt*, the Town of Hempstead enacted an ordinance regulating dredging and pit excavating on property within its limits. Plaintiffs failed, however, to provide evidence "which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." 369 U.S. at 594. The *Goldblatt* Court was thus not faced with the question whether the dredging regulation could have been insulated from the Fifth Amendment's just compensation mandate, even if the regulation had deprived the property owner of all economically viable use.

Finally, in *Keystone*, the State of Pennsylvania had enacted a Subsidence Act which was designed to prohibit mining that causes subsidence damage to certain categories of structures. In concluding that the Subsidence Act did not result in the taking of plaintiffs' property, the Court pointed out that the plaintiffs had "failed to make a showing of diminution of value sufficient to satisfy the test set forth in Pennsylvania Coal and our other regulatory takings cases." 480 U.S. at 492-93.

This Court has simply never held that a police power regulation which precludes all economically viable use may in certain circumstances be insulated from the Fifth

Amendment's just compensation mandate. As noted by Chief Justice Rehnquist in his *Keystone* dissent:

> "[O]ur cases have *never applied the nuisance exception to allow complete extinction of the value of a parcel of property.* Though nuisance regulations have been sustained despite a substantial reduction in value, *we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.*" 480 U.S. at 513 (Rehnquist, C.J., dissenting) (emphasis added).

Under Chief Justice Rehnquist's analysis of the facts in *Keystone*, the Subsidence Act *did* "completely destroy" the plaintiff's coal deposits. As such, the Chief Justice found a taking requiring just compensation because "[a]pplication of the nuisance exception in these circumstances would allow the State not merely to forbid one 'particular use' of property with many uses [as in *Mugler* and its progeny] but to extinguish *all* beneficial use of petitioner's property." 480 U.S. at 514 (Rehnquist, C.J., dissenting) (emphasis in original).

Because the Court of Common Pleas in the present action made a specific factual determination that the setback lines deprived respondent Lucas of "any reasonable economic use of the lots," and rendered the lots "valueless," the five United States Supreme Court cases cited by the Coastal Council, which all involve only *partial* diminution in value, are irrelevant.

III

THE OPINION BELOW DIRECTLY CONFLICTS WITH A RECENT NINTH CIRCUIT OPINION WHEREIN THE COURT REFUSED TO INSULATE THE GOVERNMENT FROM A JUST COMPENSATION CLAIM, EVEN THOUGH THE PROPERTY OWNER WAS PURPORTEDLY ENGAGING IN A PUBLIC NUISANCE

The Ninth Circuit has recently issued an opinion which directly conflicts with the opinion of the court below. In *McDougal v. County of Imperial*, ___ F.2d ___, 1991 WL 156897 (9th Cir. 1991), the Court of Appeals refused to insulate the government from a just compensation claim, even though the property owner's water business was purportedly contributing to a public nuisance.

The governmental entity in *McDougal* designated the plaintiffs' property a "floodway," which allegedly rendered it valueless. In defending a Fifth Amendment just compensation claim, the government argued that no taking occurred because the floodway designation was necessary to abate a public nuisance. The Ninth Circuit disagreed:

> "We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is required even if the land owner is thereby denied all use of his property. . . . Instead, we believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." *McDougal*, 1991 WL 156897 at 27-28.

The court below, in refusing to consider the economic impact of the Beachfront Management Act, has created a precedent directly at odds with the Ninth Circuit's opinion in *McDougal* and, as explained above, the precedents of this Court.

IV

EVEN IF THERE IS A NUISANCE EXCEPTION TO THE JUST COMPENSATION CLAUSE, THE CONSTRUCTION OF A HOUSE IS NOT A NOXIOUS USE OF PROPERTY

Even if it is assumed that there is a "public harm" or "nuisance" exception to the Fifth Amendment's Just Compensation Clause, the construction of a house is not even remotely a noxious use of property. The Beachfront Management Act, which is quoted extensively in the opinion below, speaks primarily of the need to protect the South Carolina coastline from erosion. It does not, and could not, justify the outright prohibition of structures as somehow constituting a "noxious" use of property on par with the maintenance of a distillery in *Mugler* and an urban brickyard in *Hadacheck*. As recently explained by the dissent in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991):

> "The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as 'tantamount to a public nuisance.' . . . [T]he Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the *Esposito* claimants' residences are not dire threats to public safety and welfare. A 'public nuisance' ought to

> be abated, not phased out through a half-lifetime of attrition." *Id.* at 173 n.2.

The Beachfront Management Act's conclusory references to the protection of "life and liberty," language which can be made part and parcel of practically any governmental enactment, cannot survive Fifth Amendment scrutiny. As this Court pointed out in *Nollan v. California Coastal Commission*, 483 U.S. 825, "[w]e view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Id.* at 841.

CONCLUSION

The dissent in the opinion below rightly bemoaned the fact that takings law "is an area of considerable confusion." *Lucas*, 404 S.E.2d at 903. In an era of increasingly complex and pervasive environmental regulations, many of which contain no provisions whatsoever for just compensation, this Court should take steps to ensure the preeminence of the United States Constitution. As laudable as environmental regulations may purport to be, it must still be recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Company v. Mahon*, 620 U.S. at 416.

For the reasons stated above, amicus respectfully requests that this Court grant the petition for certiorari.

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Respectfully submitted,

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